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Supreme Court, U.S.
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JOSEPH F. SPANIOL,
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No. 87-1257

In the Supreme Court of the United States
October Term, 1987

EMERY A. SOBONY,

Petitioner

v.

JAMES A. TILBERRY,

Respondent

ON WRIT OF CERTIORARI TO
THE OHIO COURT OF APPEALS

Brief of Respondent in Opposition to Petition For Writ of Certiorari

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8 pp

QUESTIONS PRESENTED

1. Should this Court grant certiorari when the due process claims asserted here were not made in the courts below?

2. Where an intermediate state appellate court fully reviews the record of a trial court's proceedings in a civil action for damages based on Petitioner's allegations of common law fraud and civil conspiracy and then renders judgment for Respondent after finding that the trial court erred in not granting his motions for directed verdict, and the state supreme court, after consideration of the parties' briefs, declines to allow appeal on the merits, have the state courts denied to Petitioner his rights to due process guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States?

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THE CLAIMED JURISDICTION

Petitioner mistakenly claims jurisdiction under 28 U.S.C. 1254(1), which authorizes review of the decisions of courts of appeals of the United States. The decisions below were rendered by the Court of Appeals of Ohio for the Eighth Appellate District and the Supreme Court of Ohio, which overruled Petitioner's motion to certify the record for review on the merits.

Petitioner may have intended to claim jurisdiction under 28 U.S.C. 1257(3), which authorizes review by writ of certiorari of final judgments of state courts resolving claims under the Constitution of the United States. Petitioner now claims for the first time that the decisions below violated his rights to due process guaranteed by the Fifth and Fourteenth Amendments. No such claim was made to the Court of Appeals or the Ohio Supreme Court. The only constitutional issue mentioned by Petitioner to either of the courts below was a fleeting allusion to the Seventh Amendment. (Petitioner's brief to the Ohio Supreme Court, pp. 21-22). But Petitioner now appears to recognize that there is no Seventh Amendment right to a jury trial in a civil case in a state court,[1] and no denial of Seventh Amendment rights is claimed at this time (Petition, 25-26).

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[1] The Supreme Court of the United States has consistently held that the Seventh Amendment does not obligate the states to decide civil actions through trial by jury. *Walker v. Sauvinet*, 92 U.S. 90, 92-93, 23 L. Ed. 678 (1876). "The deprivation of a right of trial by jury in a state court does not deny the parties due process of law under the federal constitution." *Wagoner Electric Manufacturing Co. v. Lyndon*, 262 U. S. 226, 232, 67 L. Ed. 961 (1923). "The court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment." *Curtis v. Loether*, 415 U. S. 189, 192, 39 L. Ed. 2d 260 (1974). "The Seventh Amendment's right to trial by jury in the federal

Supreme Court Rule 21.1(h) requires an explicit demonstration that the federal questions raised in the Supreme Court were properly raised in the courts below. Petitioner has failed to make such a showing.

STATEMENT OF THE CASE

The opinion of the Court of Appeals provides a fair and balanced statement of the relevant evidence (Appendix, A1O-A22). We adopt it as our counterstatement of the essential facts of the case.

ARGUMENT

I.

This Court should not grant certiorari to review the Fifth and Fourteenth Amendment claims which are now asserted for the first time and were never briefed or argued to either of the Ohio appellate courts. The petition fails to provide the affirmative showing required by Rule 21.1(h) that the constitutional issues asserted here were timely and properly raised in the courts below. Certiorari should not be granted to review any issue not considered below.

II.

The petition raises no meritorious issue under the Fifth or Fourteenth Amendments. What Petitioner complains of is that a state appellate court, applying state law, has concluded that the testimony he presented in support of his claims of fraud and conspiracy failed to

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courts has not been extended to the states through the Fourteenth Amendment." *Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir. 1983). *Melancon v. McKeithen*, 345 F. Supp. 1025 (E. D. La. 1972), aff'd, 409 U. S. 943, 1098, 34 L. Ed. 2d 214, 679 (1973).

provide sufficient evidence of the essential elements of those causes of action to warrant submission of his case to the jury and that Respondent was therefore entitled to judgment as a matter of law. Rule 12(B) of the Ohio Rules of Appellate Procedure provides:

> "* * * When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order."

The decision of the Court of Appeals was an exercise of its jurisdiction to review the decisions of trial courts and to correct errors which taint trial court judgments.[2] There is nothing lacking in due process about an appellate court decision which deprives a litigant of an award won through error in a jury trial. The reversal of such a judgment, in order to bring the final judgment into accordance with state law, does not amount to deprivation of property without due process. The Fifth and Fourteenth Amendments do not give anyone a vested interest in an erroneous jury verdict or eliminate the possibility of its correction on review.

Petitioner was accorded due process: a searching review of the record by the Court of Appeals following extensive briefing and oral argument, and a subsequent

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[2] From the earliest period in the state's history, Ohio courts have exercised their common law authority to take the evidence from a jury in a proper case and order a peremptory nonsuit. *Ellis v. Ohio Life Insurance & Trust Co.*, 4 Ohio St. 628 (1855).

appeal to the Ohio Supreme Court which, after consideration of the briefs of both sides, declined to accept the case for review of the merits of Petitioner's contention that the Court of Appeals misapplied state law.

Petitioner's real claim is that the Court of Appeals erred in its application of state law and that the Ohio Supreme Court failed to correct that error. But such errors are not deprivations of due process under the Fourteenth Amendment. "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." *American Railway Express Co. v. Commonwealth of Kentucky*, 273 U. S. 269, 272-273, 71 L. Ed. 639, 641 (1927). "We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise every erroneous decision by a state court on state law would come here as a federal constitutional question." *Gryger v. Burke*, 334 U. S. 728, 731, 92 L. Ed. 1683, 1687 (1948); *reh. den.* 335 U. S. 837, 93 L. Ed. 389. *Wood v. Conneaut Lake Park, Inc.*, 386 F.2d 121, 124-125 (3rd Cir. 1967); *East Crossroads Center, Inc. v. Mellon-Stuart Company*, 245 F. Supp. 191, 193-194 (W. D. Pa. 1965).

Even if the due process claims had been properly and timely asserted in the courts below — which they were not — they lack any substantive legal merit.

CONCLUSION

Because Petitioner never raised in the courts below his present claim that his Fifth and Fourteenth Amendment rights to due process were denied, he has no standing to raise that claim in this Court. Substantively, that claim is spurious. None of the special considerations described in Rule 17.1 are present here. The petition is without merit and should be denied.

Respectfully submitted,

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